Office - Supreme Court
FILED
NOV 2 1
HAROLD B. WILEY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 504

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,
Petitioner,

vs.

AUDRA H. PALMER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

R. S. CATHCART,
J. BARTON PHELPS,
BLEDSOE, SMITH, CATHCART, JOHNSON & PHELPS,
315 Montgomery Street, San Francisco 4, California,
SCOVILLE & LEWTON,
319 Heard Building, Phoenix, Arizona,
Attorneys for Petitioner.

Subject Index

	Page
I. Opinion below	2
II. Jurisdictional statement	2
III. Questions presented for review	3
IV. Statutes and rules involved	3
V. Statement of facts	5
VI. Reasons for granting writ	8
VII. Argument	9
I. The notice of appeal, even though it referred to the date on which the motion for a new trial was denied, was sufficient to invoke the appellate jurisdiction of the Court of Appeals to review the final judgment entered in this case	9
II. The defect (if any) in the notice of appeal ran only to form and should have been disregarded in accordance with the enlightened policy expressed in the Federal Rules of Civil Procedure and in the Judicial Code and the decisions of this court which have construed them	14
VIII. Conclusion	17

Table of Authorities Cited

Cases

Pages

Atlantic Coast Line R. Co. v. Mims (C.C.A. 5, 1952) 199 Fed. (2d) 582 11

Crump v. Hill (C.C.A. 5, 1939) 194 Fed. (2d) 36 16
Cutting v. Bullerdick (C.C.A. 9, 1949) 178 Fed. (2d) 774 .. 14

Hoiness v. United States (1948) 335 U.S. 297 ..... 8, 15, 16

Porter v. Borden's Dairy (C.C.A. 9, 1946) 156 Fed. (2d) 798 15

Safeway Stores v. Coe (U.S. Ct. App., Dist. of Col., 1943) 136 Fed. (2d) 771 12
Shannon v. Retail Clerks etc. Assn. (C.C.A. 7, 1942) 128 Fed. (2d) 553 15
Sobel v. Diatz (U.S. Ct. App., Dist. of Col., 1951) 189 Fed. (2d) 26 12

United States v. Arizona (1953) 346 U.S. 907 ..... 8, 15
United States v. Ellicott (1912) 223 U.S. 524 ..... 8, 10

Voehl v. Indemnity Insurance Co. (1933) 288 U.S. 162 17

Wetherbee v. Elgin etc. Co. (C.C.A. 7, 1953) 204 Fed. (2d) 755 12
Wilson v. So. Rwy. (C.C.A. 5, 1945) 147 Fed. (2d) 165 11

Codes

United States Code, Title 28, Section 777 (repealed June 25, 1948, 62 Stat. 992, Chapter 646, Section 39) 3, 4, 16, 17
United States Code, Title 28, Section 1254(1) 2
United States Code, Title 28, Section 1291 ..... 2, 3
United States Code, Title 28, Section 1332 2
United States Code, Title 28, Section 2111 ..... 3, 4, 8, 15

Rules

Federal Rules of Civil Procedure:
Rule 61 ..... 3, 4, 8, 15, 16, 17
Rule 73(b) 3, 8, 9

Texts

13 Cyclopedia of Federal Procedure 473, Section 60.94. ... 14

14 Cyclopedia of Federal Procedure, Section 6855 16

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,
Petitioner,

vs.

AUDRA H. PALMER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

The Petitioner, State Farm Mutual Automobile Insurance Company (a corporation), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 24, 1955, by which judgment that Court dismissed Petitioner's appeal from a final money judgment

rendered against Petitioner and in favor of Respondent by the United States District Court for the District of Arizona.

I.

OPINION BELOW.

The opinion of the Court of Appeals appears as Appendix A to this petition. The judgment of the Court of Appeals appears as Appendix B to this petition.

II.

JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals was made and entered on March 24, 1955 (Tr. 357). A petition for rehearing was filed April 22, 1955, and denied September 23, 1955 (Tr. 358).

The jurisdiction of this Court is invoked under the provisions of United States Code, Title 28, section 1254 (1).

The jurisdiction of the Court of Appeals was based on United States Code, Title 28, section 1291 (appeal from a final decision of a District Court of the United States); the jurisdiction of the District Court was based on United States Code, Title 28, section 1332 (diversity of citizenship).

III.

QUESTIONS PRESENTED FOR REVIEW.

Is a notice of appeal which particularizes the terms of the money judgment complained of insufficient as a matter of law to invoke the appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit merely because it recites that Appellant "hereby appeals from the order" denying motion for new trial "insofar as said order * * * grants judgment" to Respondent?

Were not the provisions of United States Code, Title 28, section 777 (repealed June 25, 1948, 62 Stat. 992, c. 646, section 39) incorporated into Rule 61, Federal Rules of Civil Procedure, and do not Rule 61 ("Harmless Error") and United States Code, Title 28, sec. 2111 ("Harmless error") require that appeals be heard on the merits rather than summarily dismissed because of objection (if valid at all) running only to form?

IV.

STATUTES AND RULES INVOLVED.

United States Code, Title 28, sec. 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. * * *"

Rule 73(b) of *Federal Rules of Civil Procedure:*

> "*Notice of Appeal.* The notice of appeal shall specify the parties taking the appeal; shall desig-

nate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. * * *"

Rule 61, *Federal Rules of Civil Procedure:*

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

United States Code, Title 28, sec. 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

United States Code, Title 28, sec. 777 (repealed June 25, 1948, 62 Stat. 992, c. 646, sec. 39):

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the

cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

V.

STATEMENT OF FACTS.

On May 15, 1951, Respondent Palmer as plaintiff filed this action in the District Court of the United States for the District of Arizona, seeking to compel Appellant State Farm Mutual Automobile Insurance Company to pay $10,000 on account of liability claimed to exist in respect of an automobile liability policy issued to one Noller, against whom Respondent had previously obtained a judgment in a personal injury action in the State Court in Arizona (Tr., pp. 3-5).

On July 6, 1954, in the instant action Findings of Fact and Conclusions of Law in favor of Respondent were signed, filed and docketed, directing that judgment be entered in favor of Respondent (Tr., 35-41).

On July 6, 1954, the following entry (the only "judgment" ever formalized) was made in the Civil Docket by the clerk of the Federal District Court (Tr., p. 42):

"[Title of District Court and Cause.]

CIVIL DOCKET

Date Filings—Proceedings

* * *

July 6, 1954, 6:00 p.m. Enter judgment for the plaintiff Audra H. Palmer against defendant State Farm Mutual Automobile Insurance Company, a corporation, in the sum of $10,000.00, together with interest thereon at the rate of six per cent per annum from January 18, 1951, until paid, together with her costs herein incurred."

* * *

On July 15, 1954, Appellant filed a motion for new trial and a Motion to Amend Findings (Tr., pp. 43-46).

On August 27, 1954, the following Order was filed and docketed (Tr. p. 46):

"[Title of District Court and Cause.]

ORDER

Defendant's motions for new trial and to amend findings are denied.

Dated: August 24, 1954, at Portland, Oregon.

/s/ Dave W. Ling,
U. S. District Judge.

[Endorsed]: Filed and docketed August 27, 1954."

On September 17, 1954, Appellant caused the following document to be filed with the Clerk of the District Court (Tr. pp. 48-49):

"[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that State Farm Mutual Automobile Insurance Company, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order entered in the above-entitled and numbered cause on August 24, 1954, in favor of Plaintiff, Audra H. Palmer, and against the Defendant, State Farm Mutual Automobile Insurance Company, insofar as said order of August 24, 1954, denies Defendant's motions for new trial and denies Defendant's motions to amend findings and grants judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein.

Dated this 17th day of September, 1954.

Scoville & Linton,

By /s/ Walter Linton,

Attorneys for Defendant, State Farm Mutual Automobile Insurance Company, a Corporation.

[Endorsed]: Filed September 17, 1954."

The Transcript of Record was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit on October 25, 1954 (Tr., p. 346), and the Mo-

tion to Dismiss was filed by Respondent on January 19, 1955. The appeal was ordered dismissed by the Judgment entered March 24, 1955 (See Appendix B).

VI.

REASONS FOR GRANTING WRIT.

(a) The decision of the Court of Appeals conflicts with the decision of this Court in *United States v. Ellicott* (1912) 223 U.S. 524.

(b) The decision of the Court of Appeals conflicts with the decisions of the Courts of Appeals for the Fifth Circuit, the Seventh Circuit and the District of Columbia.

(c) The decision of the Court of Appeals runs counter to the letter and spirit of Rules 61 and 73(b), Federal Rules of Civil Procedure, and section 2111 of Title 28, United States Code, and to the rulings of this Court in *Hoiness v. United States* (1948) 335 U.S. 297 and *United States v. Arizona* (1953) 346 U.S. 907, in which this Court reversed orders of the Court of Appeals for the Ninth Circuit by which appeals had been dismissed without a hearing on the merits because of mere formal objections to the notice of appeal.

(d) This Court's power of supervision should be exercised to determine whether the form of notice of appeal here involved was sufficient, as held by this Court and by the Courts of Appeals for the Fifth and Seventh Circuits and the District of Columbia, or

insufficient, as held by the United States Court of Appeals for the Ninth Circuit in the instant case.

VII.

ARGUMENT.

I.

THE NOTICE OF APPEAL, EVEN THOUGH IT REFERRED TO THE DATE ON WHICH THE MOTION FOR A NEW TRIAL WAS DENIED, WAS SUFFICIENT TO INVOKE THE APPELLATE JURISDICTION OF THE COURT OF APPEALS TO REVIEW THE FINAL JUDGMENT ENTERED IN THIS CASE.

The sole question in this case is not whether the order of August 24, 1954, was an appealable order as such, but whether the Notice of Appeal filed by the Appellant was sufficient in form to invoke the appellate jurisdiction of the Court of Appeals to review the final judgment in this case.

Rule 73(b) of the Federal Rules of Civil Procedure (quoted above) does not prescribe any particular form for the notice. It merely says, "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken * * *"

The Notice of Appeal filed by Appellant in this case complies (we submit) with the provisions of Rule 73(b).

There was only one final judgment. It awarded the plaintiff (Respondent here) the sum of $10,000, together with interest thereon at the rate of 6% per

annum from January 18, 1951, together with her costs. The terms of that judgment were embraced in the entry in the Civil Docket (Tr., p. 42), and they were set out with particularity in the Notice of Appeal filed by Appellant (Tr., pp. 48-49). We cannot believe that the Notice of Appeal was ineffective because it referred also to the date on which the order denying the motion for a new trial was entered.

A notice of appeal in substantially the same form was held sufficient by this Court in *United States v. Ellicott* (1912) 223 U.S. 524. In that case the final judgment was entered against the United States on *May 18, 1908*; the United States filed a motion for new trial which was overruled on *January 4, 1909*; various other motions were then made and ruled upon and on February 25, 1909, the United States gave notice of appeal and in its notice of appeal specified that it was appealing *"from the judgment rendered in the above-entitled cause on the 4th day of January, 1909,"* which was the date of the order denying motion for new trial.

The appellee filed a motion to dismiss the appeal on the ground that it was not from a final judgment "but was merely from the order overruling the motion for a new trial." This Court summarily denied the motion to dismiss, stating "The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees * * * treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for

rehearing * * * has been disposed of; and the time for appeal begins to run from the date of such disposition."

Numerous cases are in accord:

Wilson v. So. Rwy. (C.C.A. 5, 1945) 147 Fed. (2d) 165:

The judgment was entered April 27, 1944. A motion for a new trial was denied by order dated June 10, 1944. Thereafter, the appellant filed a notice of appeal "from the final judgment entered in this action on June 10, 1944." In denying the motion to dismiss, the Court of Appeals for the Fifth Circuit stated:

> "it is clear that the notice of appeal was intended to obtain a review of the judgment of April 27, 1944, which was the only appealable judgment entered in the cause. Therefore, we hold that the notice was sufficient to perfect an appeal to this Court from the judgment of April 27, 1944."

Atlantic Coast Line R. Co. v. Mims (C.C.A. 5, 1952) 199 Fed. (2d) 582:

A motion for new trial was denied. The defendant gave notice of appeal "from the judgment overruling its motion for new trial." In denying the motion to dismiss, the Court stated:

> "While we agree with appellees that an appeal will not lie from an order overruling a motion for new trial, we agree with appellant that, though the order appealed from was misnamed, it clearly enough appears from the record as a whole that the intent was to appeal from the judgment and that that intent should be given effect."

Wetherbee v. Elgin Etc. Co. (C.C.A. 7, 1953) 204 Fed. (2d) 755:

The judgment appealed from was entered in January, 1952. The motion for new trial was denied March 21, 1952. The notice of appeal recited that appellant appeals "from the judgment entered in this action" on March 21, 1952. In denying the motion to dismiss, the Court of Appeals for the Seventh Circuit stated:

> "Under the circumstances we feel that appellee was not misled or prejudiced in any way. The mistake as to the date of the entry of the judgment appealed from was immaterial."

Sobel v. Diatz (U.S. Ct. App., Dist. of Col., 1951) 189 Fed. (2d) 26:

A rehearing had been denied by the trial Court on November 23. The notice of appeal recited "that the appeal is from the order of the 23rd day of November." In denying a motion to dismiss, the Court of Appeals for the District of Columbia said:

> "it is obvious that the appeal was intended to be from the order granting judgment * * * Under these circumstances we may treat the notice as an appeal from the judgment."

See also:

Safeway Stores v. Coe (U.S. Ct. App., Dist. of Col., 1943) 136 Fed. (2d) 771.

In the discussion just set forth, we have shown that this Court as well as the Courts of Appeal of the Fifth and Seventh Circuits and of the District of Columbia hold that a notice of appeal which refers only to the date on which a motion for new trial was denied is sufficient to invoke the appellate jurisdiction of the court.

As above indicated, the judgment of the United States Court of Appeals for the Ninth Circuit in the instant case is contrary to the position taken by this Court and by numerous other United States courts.

As a matter of fact, the Notice of Appeal filed in this case went much further than the notices of appeal which were held sufficient in the cases above referred to, because our notice actually set out the terms of the judgment complained of.

Had our Notice of Appeal merely eliminated any reference to the order of August 24, 1954 (that is, had the words commencing with "order" and ending with "grants" been eliminated from the Notice of Appeal), even the most highly technical application of the rules invoked by appellee could not have rendered our Notice of Appeal subject to the unfounded objections here urged.

That technicalities should not be used as a basis for dismissing an appeal without a hearing on the merits appears well established by the doctrines which we now discuss.

II.

THE DEFECT (IF ANY) IN THE NOTICE OF APPEAL RAN ONLY TO FORM AND SHOULD HAVE BEEN DISREGARDED IN ACCORDANCE WITH THE ENLIGHTENED POLICY EXPRESSED IN THE FEDERAL RULES OF CIVIL PROCEDURE AND IN THE JUDICIAL CODE AND THE DECISIONS OF THIS COURT WHICH HAVE CONSTRUED THEM.

Eliminating any reference to the order of August 24, 1954, our notice of appeal would read as follows:

> "Notice Is Hereby Given that State Farm Mutual Automobile Insurance Company, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the * * * judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein."

We respectfully submit that adding to the above a reference to the order of August 24—or designating the order of August 24 instead of the order of July 6—is not such a departure from the rules as warrants the drastic action of dismissing an appeal without hearing it on the merits.

As stated by Judge Denman in *Cutting v. Bullerdick,* (C.C.A. 9, 1949) 178 Fed. (2d) 774, "The rule of strict construction does not apply to the acquiring of jurisdiction by an appellate court. On the contrary, the steps taken for an appeal are to be liberally construed as appears from the cases cited * * *"

As stated in 13 *Cyclopedia of Federal Procedure,* page 473, Sec. 60.94:

> "If the notice is sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment."

Mistakes in dates have never been held to nullify notices of appeal otherwise valid. See *Porter v. Borden's Dairy* (C.C.A. 9, 1946) 156 Fed. (2d) 798, and *Shannon v. Retail Clerks etc. Assn.* (C.C.A. 7, 1942) 128 Fed. (2d) 553.

The liberal doctrines referred to in the authorities just cited are embodied in Rule 61, Federal Rules of Civil Procedure, and United States Code, Title 28, sec. 2111, which we have quoted above.

In *Hoiness v. United States* (1948) 335 U.S. 297, this Court reversed a judgment of the Court of Appeals for the Ninth Circuit by which an appeal was dismissed without a hearing on the merits because of a claimed deficiency in the notice of appeal. Two orders were involved, one appealable and one not appealable. The petition for appeal referred solely to the order which was not appealable, but this Court held: "that defect was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in * * * section 777 of Title 28, United States Code."

Only five years later, this Court again had occasion in a memorandum opinion to reverse a judgment of the Court of Appeals for the Ninth Circuit by which an appeal was dismissed on the merits because of claimed defects in the notice of appeal. See *United States v. Arizona* (1953) 346 U.S. 907.

In seeking to avoid or distinguish the rule of the *Hoiness* case, the Court of Appeals in its opinion in the instant case pointed out that section 777 "does not apply to this case because the action was not pending prior to the repeal of that section."

It is quite true that section 777 has been repealed, but we suggest that the Court of Appeals has overlooked the fact that the provisions of section 777 have been embodied in Rule 61 of the Federal Rules of Civil Procedure.

In this connection it is to be noted that the Advisory Committee on Rules in its comment on Rule 61 stated (14 Cyc. Fed. Proc., Sec. 6855) that it was:

> "A combination of U.S.C.A., Title 28, sec. 2111, former sec. 391 (New Trials; harmless error) and former sec. 777 (Defects of form, amendments) with modifications. See McCandless v. United States 1936, 56 S. Ct. 764, 298 U.S. 342, 80 L. Ed. 1205. Compare former Equity Rules 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of former Equity Rule 46 (Trial—Testimony Usually taken in Open Court —Rulings on Objections to Evidence). For the last sentence see the last sentence of former Equity Rule 19 (Amendments Generally)."

See also:

> *Crump v. Hill* (C.C.A. 5, 1939) 194 Fed. (2d) 36.

Furthermore, it is to be recalled that in the opinion of this Court in the *Hoiness* case the footnote referring to the repeal of section 777 ended with "and see Rules 1, 15, 61 and 81 Rules of Civil Procedure."

It is thus clear that section 777 lives on in Rule 61, Rules of Civil Procedure, and that the interests of justice and orderly procedure require that the order dismissing the appeal without a hearing on the merits be reversed.

We believe that the *Hoiness* case stands for the proposition that where the notice of appeal sufficiently apprises the appellee of the judgment from which appeal is taken, any objection running only to form must be disregarded. "No one was misled or injured."

(*Voehl v. Indemnity Insurance* Co. (1933) 288 U.S. 162 at 177.)

VIII.

CONCLUSION.

In conclusion, it is respectfully submitted that a writ of certiorari should issue in the instant case to review the judgment of the United States Court of Appeals for the Ninth Circuit to the end that the appeal may be heard on its merits.

Dated, San Francisco, California,
October 31, 1955.

Respectfully submitted,

R. S. CATHCART,
J. BARTON PHELPS,
BLEDSOE, SMITH, CATHCART, JOHNSON & PHELPS,
SCOVILLE & LINTON,
Attorneys for Petitioner.

(Appendices A and B Follow.)

Appendix A

OPINION.

United States Court of Appeals for the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, *Appellant*, vs. AUDRA H. PALMER, *Appellee*.	No. 14,560 Mar. 24, 1955

Upon Appeal from the United States District Court for the District of Arizona.

On Appellee's Motion to Dismiss Appeal

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

Plaintiff, according to the record, sustained personal injuries on January 17, 1948, as a result of operation of an automobile by one Nollner. She recovered a judgment on January 18, 1951, after trial, for $27,500.00 for damages against Nollner in the state court. The latter was insured by defendant to the extent of $10,000.00 only by a policy in force at the time plaintiff was injured. Plaintiff brought action in the United States District Court on the policy. Defendant

resisted on the ground that Nollner had not appeared at the original trial. The cause was tried in February, 1952. On October 22, 1953, a minute order was entered in favor of defendant, but, on consideration of the findings of fact, judgment for plaintiff entered July 6, 1954. Defendant filed a motion for new trial and to amend the findings, which the trial court denied August 24, 1954. The defendant filed notice of appeal from this order on September 17, 1954, insofar as it denied amendment of the findings and put the judgment in effect.

The appellee has moved to dismiss the appeal because it was not taken from a final judgment.

Appellant acquiesces in this statement but urges (1) that an intention to review the judgment on the merits can be ascertained from the notice, (2) that the notice was filed within time to perfect an appeal from the judgment, (3) that a motion was filed to amend the notice of appeal long after the time for filing thereof had lapsed, and (4) that, by the points and specifications of errors placed in the record after time of filing the notice had expired, sufficient definiteness was attained.

The filing of the notice of appeal goes to the jurisdiction. The third and fourth points cannot avail appellant. The fact that the notice of appeal was filed within the prescribed time is a condition precedent to any relief for appellant. The intention to ask review of the judgment might be inferred from the text of the notice. Appellant asks that it be so construed notwithstanding the notice definitely states the appeal is

taken "from the order entered in the above-entitled and numbered cause on August 24, 1954, in favor of Plaintiff, Audra H. Palmer, and against the Defendant, State Farm Mutual Automobile Insurance Company * * *."

In two cases in this circuit the Supreme Court directed appeals to be heard where the notice was defective in minor particulars. In the first,[1] there was an order which apparently entered judgment but directed the filing of findings of fact and conclusions of law. Thereafter, findings of fact, conclusions of law and final judgment were entered. The trial court allowed appeal from the latter, and all parties treated it as the "final order." The Supreme Court held that, whether the first or second order was final, the appeal was timely as to either and the matter was not defective. In the second case,[2] the appeal was timely from the final order, but the appellant made the mistake of specifying the nonappealable phase in the notice. Here it was held the notice was sufficient.

It seems apparent the Supreme Court did not announce in either of these cases that an intermediate appellate court is required to grant a hearing as of right to a litigant irrespective of the timely filing of notice of appeal or a violation of other statutes or rules of court relating thereto.

---

[1]Hoiness vs. United States, 335 U.S. 297, reversing 165 F.2d 504. It should be noted that the statute, 28 U.S.C. (1946 Ed.) § 777, does not apply to this case because the action was not pending prior to the repeal of that section.

[2]United States vs. State of Arizona, 346 U.S. 907, reversing 206 F.2d 159. The Rules of Civil Procedure do not affect this situation. No appeal lies unless taken from a "final decision."

No appeal lies from the order of August 24, which in its entirety reads:

> "Defendant's motions for new trial and to amend findings are denied."

This Court has treated an appeal from such an order as void[3] on jurisdictional grounds.[4] There is no public policy which demands a departure from this authority in the case at bar. Appeals are not of right, but of grace. The Supreme Court of the United States regularly denies certiorari where much more important considerations for the parties are involved.

---

[3]Libby, McNeill & Libby vs. Alaska Industrial Board, 9 Cir., 215 F.2d 781. There it was said: "Appellant erroneously assumes that this 'minute order' denying its motion for a new trial is appealable as a 'final decision' under Section 1291 of Title 28 U.S. Code. An order denying a motion for a new trial is not the kind of 'final decision' contemplated by the statute. • • • The doctrine thus adopted is only an exemplification of the statutory limitation that jurisdiction does not attach unless appeal is taken from a 'final decision.' Most other courts follow a like rule. In many other situations this court has enforced the jurisdictional requirement that appeal is to be taken from a 'final decision' with meticulous and technical exactness. • • • The final decision in the instant action from which an appeal to this court might have been taken under Section 1291, supra, was the decree of January 2, 1953. No appeal from that decree was taken, hence this court is without jurisdiction of the purported appeal now before us. It must be, and, hereby is, dismissed." (page 782.)

[4]The only appealable judgment in the case at bar is the judgment of the court on July 6, 1954. The Courts of Appeal are without jurisdiction to review the decision of a District Court in the absence of an appeal from the judgment. In re McIntosh, 9 Cir., 95 F.2d 627; Armstrong vs. New LaPaz Gold Mining Co., 9 Cir., 107 F.2d 453, 454; United States vs. Tavares Construction Co., 9 Cir., 175 F.2d 379, 380; Agostino vs. Ellamar Packing Co., Inc., 9 Cir., 191 F.2d 576, 577; Bass vs. Baltimore & Ohio Terminal R. Co., 7 Cir., 142 F.2d 779, 780; Ford Motor Co. vs. Busam Motor Sales, Inc., 7 Cir., 185 F.2d 531, 533; Luckenbach S.S. Co. vs. United States, 272 U.S. 533.

This failure is jurisdictional. Whatever may have been the situation in other cases, no power is given this Court to construe the notice here.[5] The only "final decision" (28 U.S.C.A. § 129) which could have been appealed was the judgment of July 6, 1954. The only order specified on the notice of appeal was that order of August 24, 1954, which has been completely set out above and which is not appealable. Our former ruling is in point and is followed. Libby, McNeill & Libby vs. Alaska Industrial Board, 215 F.2d 781.

Motion to dismiss appeal granted.

(Endorsed:) Opinion. Filed Mar. 24, 1955.
Paul P. O'Brien, Clerk.

---

[5]Since the whole text of the order appealed from is set out, it is not necessary for the Court to give any effect to the words of the notice, which apparently state what the author conceived to be the legal effect of the minute order "insofar as said order of August 24, 1954, denies Defendant's motions for new trial and denies Defendant's motions to amend findings and grants judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein."

Appendix B

JUDGMENT.

United States Court of Appeals for the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, *Appellant*, vs. AUDRA H. PALMER, *Appellee*.	No. 14,560

JUDGMENT

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and on motion of Appellee for dismissal of the appeal herein, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the motion to dismiss be, and hereby is granted, and that the appeal in this cause be, and hereby is dismissed.

(ENDORSED) Judgment

Filed and Entered: March 24, 1955

PAUL P. O'BRIEN, Clerk.

DEC 29 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 504

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,
Petitioner,

vs.

AUDRA H. PALMER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES R. MOORE
ELIAS M. ROMLEY
ANTHONY T. DEDDENS

MOORE & ROMLEY
519 Title & Trust Bldg., Phoenix, Arizona
Attorneys for Respondent

INDEX

		Page
I.	Opinion Below	1
II.	Jurisdiction	1
III.	Questions Presented For Review	2
IV.	Statutes and Rules Involved	2
V.	Statement of Facts	4
VI.	Reasons for Denying Writ	5
VII.	Argument	6

I. Jurisdiction of Court of Appeals is statutory; and such Court may review only judgments, decrees or orders of a Court lawfully brought before it for review by notice of appeal from a final decision or order from which an appeal may be taken. Petitioner gave notice of appeal from the order of the District Court denying a motion for new trial, which is not an appealable order 6

II. Notice of appeal from an order denying a motion for new trial and to amend findings, which order is correctly identified by the date thereof in the notice, is not an appeal taken from a final decision. The decisions of this Court, the Fifth and Seventh Courts of Appeals and the Court of Appeals for the District of Columbia are not in conflict with the decision of the Court below.... 8

III. There is neither a mistake in date nor mere defect in form in Petitioner's Notice of Appeal.... 11

IV. Neither the enlightened policy expressed in the Federal Rules of Civil Procedure, nor repealed Sec. 777 of former Title 28, *United States Code*, as carried forward in present Sec. 2111 of the Judicial Code, can confer jurisdiction on Court of Appeals or amend the jurisdictional requisites of Secs. 1291 and 2106 of the Judicial Code or be invoked to supply jurisdictional defects..... 12

INDEX — (Cont.)

Page

V. The rulings of this Court in the Hoiness case and the Arizona case are not contrary to the ruling of the Court below 15

VI. The real issue before this Court is one of jurisdiction of the Court of Appeals and not one of discretion 17

TABLE OF AUTHORITIES CITED

CASES

	Page
Agostino vs. Ellamar Packing Co., Inc., (C.A. 9) 191 Fed.(2d) 576	6
Armstrong vs. New LaPaz Gold Mining Co. (C.C.A. 9) 107 Fed.(2d) 453	6
Atlantic Coast Line R. Co. vs. Mims (C.C.A. 5) 199 Fed.(2d) 582	9, 10
Audi Vision Inc. vs. R.C.A. Mfg. Co. Inc., 136 Fed.(2d) 621	13, 16
Bass vs. Baltimore & O. Terminal R. Co. (C.C.A. 7) 142 Fed.(2d) 779	6
Board of Governors of Federal Reserve System vs. Trans-America Corp. (C.A. 9), 184 Fed.(2d) 311	13, 16
Cobbledick vs. United States, 60 S. Ct. 540, 309 U.S. 323, 84 L. Ed. 783	6
Cohen vs. Beneficial Industrial Loan Corp., 69 S. Ct. 1221, 337 U.S. 541, 93 L. Ed. 1528	6
Ford Motor Co. vs. Busam Motor Sales, Inc. (C.A. 7) 185 Fed.(2d) 531	7
Hoiness vs. United States, 335 U.S. 297, 93 L. Ed. 16	5, 15, 16
In Re Griggs, 233 Fed. 243	14
In Re McIntosh (C.C.A. 9), 95 Fed.(2d) 627	6
Leonard vs. Socony-Vacuum Oil Co., 130 Fed.(2d) 535	13, 16
Libby, McNeill & Libby vs. Alaska Industrial Board (C.A. 9) 215 Fed.(2d) 781	6, 7
Luckenbach S.S. Co. vs. United States, 47 S. Ct. 186, 272 U.S. 533, 71 L. Ed. 394	7

TABLE OF AUTHORITIES CITED — (Cont.)

	P
Mookini et al vs. U.S., 303 U.S. 584, 82 L. Ed. 748	13,
Ohl and Company vs. Smith Iron Works, 288 U.S. 170, 77 L. Ed. 681	
Porter vs. Borden's Dairy Delivery Co., 156 Fed.(2d) 798	
Safeway Stores vs. Coe, 136 Fed.(2d) 771	9,
Shannon vs. Retail Clerks Int. Protective Ass'n., 128 Fed.(2d) 553	
Sobel vs. Diatz, 189 Fed.(2d) 26.	
State Farm Mutual Insurance Company vs. Audra H. Palmer, 225 Fed.(2d) 876	1, 5,
Uinted States vs. Arizona, 346 U.S. 907, 98 L. Ed. 405	5, 15,
United States vs. Ellicott, 223 U.S. 524, 56 L. Ed. 535	5, 8
United States vs. Sherwood, 312 U.S. 584, 85 L. Ed. 1058	13,
United States vs. Tavares Const. Co. (C.A. 9) 175 Fed. (2d) 379	
Voehl vs. Indemnity Insurance Co., 288 U.S. 162	
Wetherbee vs. Elgin, etc., Co. (C.C.A. 7), 204 Fed(2d) 755	
Wilson vs. Southern Ry. Co. (C.C.A. 5), 147 Fed.(2d) 165	

TABLE OF AUTHORITIES CITED — (Cont.)

AUTHORITY	Page
1 Federal Practice and Procedure, Barron & Holtzhoff, 1955 Pocket Part, Sec. 121, p. 106	13
CODES	
United States Code, Title 28, Section 777 (repealed June 25, 1948, 62 Stat. 992, c. 646 § 39)	2, 12, 13, 14, 16
United States Code, Title 28, 1254(1)	2
United States Code, Title 28, 1291	2, 6, 10, 12, 14, 18
United States Code, Title 28, 1292	6, 18
United States Code, Title 28, 2106	2, 6, 10, 12, 14, 18
United States Code, Title 28, 2111	2, 3, 5, 12, 14
United States Code, Title 28, 2072	3
RULES	
Federal Rules of Civil Procedure:	2, 5, 12, 13, 14, 16
Rule 1	3, 13, 16
Rule 61	5, 12, 13, 14, 16
Order of Supreme Court of United States dated June 3, 1935 appointing Advisory Committee to formulate Federal Rules of Civil Procedure	3